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Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

SWAMI INC.
Petitioner,

v.

ROBERT LEE in his capacity as Allen County Treasurer,
THERESE BROWN in her capacity as Allen County Auditor,
and THELMA RETZ
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I

.Did the Indiana Court of Appeals violate Swami's procedural due process rights by sidestepping constitutional review of Indiana's tax sale procedure under the *Jones* case by improperly finding and relying upon implied waiver.

II

In terms of the merits of Swami's procedural due process claim based upon constitutionally insufficient notice, does Indiana's Tax Sale procedure applied to Swami pass constitutional muster as set forth by this Court in the case of *Jones v. Flowers*.

PARTIES TO THE PROCEEDINGS

Petitioner is Swami Inc., an Indiana Corporation which was a Defendant in the Trial Court in a proceeding filed in the Allen County, Indiana Circuit Court concerning the sale of certain real estate for the payment of unpaid property taxes. Respondents are Robert Lee in his capacity as Allen County Treasurer and Therese Brown in her capacity as Allen County Auditor who were Plaintiffs in the Trial Court. Respondent Thelma Retz was an intervener in the Trial Court. The Respondents were all Appellants in the Indiana Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Swami Inc. is a closely held Indiana Corporation with no parent corporation and no publicly held company owns ten percent (10%) or more of Swami Inc. stock.

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IN THE
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SWAMI INC.
Petitioner,

v.

ROBERT LEE in his capacity as Allen County Treasurer, THERESE BROWN in her capacity as Allen County Auditor, and THELMA RETZ
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioner Swami Inc. (hereinafter "Swami"), by counsel Robert R. Faulkner, respectfully petitions for a writ of certiorari to review the judgment of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The January 25, 2008 opinion of the Indiana Court of Appeals is not reported. It is reproduced in Appendix A at App. p. 2. The April 1, 2008 Memorandum Decision on Rehearing was not published. It is reproduced in Appendix E at App. p. 30. The Order of the Indiana Supreme Court Denying Transfer is reproduced in Appendix F at

App. p. 36. The Opinions/Orders of the Trial Court Granting Petitioner's Motion to Set Aside Tax Deed are reproduced in Appendices B, C and D at App. p. 21, p. 23 and p. 27 respectively. It is from the Opinions/Orders of the Trial Court that the Respondents appealed which were reversed by the Indiana Court of Appeals.

JURISDICTION

The Indiana Court of Appeals entered its opinion on January 25, 2008. Petitioner then timely filed a Petition for Rehearing on February 21, 2008 which was denied on April 1, 2008. Petitioner then filed a timely Petition to Transfer to the Indiana Supreme Court on May 1, 2008 which was denied on July 10, 2008. Petitioner has filed this Petition within ninety (90) days as required by Supreme Court Rule 13(1). Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1257.

The constitutional issues discussed herein were raised by Swami in its Motion for Relief from Judgment filed in the Trial Court on or about August 25, 2006 and its Memorandum in Support thereof also filed that date. The Trial Court ruled in favor of Swami on those issues (Appendices B, C and D hereto). The constitutional issues discussed herein were further raised by Swami at the appellate stage in its Brief of Appellee, Petition for Rehearing and Petition to Transfer to the Indiana Supreme Court. Neither the Indiana Court of Appeals nor the Indiana

Supreme Court addressed the merits of the constitutional issues raised by Swami and decided by the Trial Court, (Appendix A, E and F hereto).

The provisions of 28 USC § 2403 (b) Pursuant to Rule 29.4 (c) of the rules of the United States Supreme Court, the Attorney General of the State of Indiana is being served with three (3) copies of this Petition and Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5 to the constitution of the United States states as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Amendment 14 to the Constitution of the United States states as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The primary Indiana Statute at issue herein is I.C. 6-1.1-25-4.6 as follows:

Petition to court for issuance of tax deed; court orders; refunds; effects of tax deed; appeal

Sec. 4.6. (a) After the expiration of the redemption period specified in section 4 of this chapter but not later than six (6) months after the expiration of the period of redemption:

(1) the purchaser, the purchaser's assignee, the county executive, or the purchaser of the certificate of sale under IC 6-1.1-24 may; or

(2) in a county where the county auditor and county treasurer have an agreement under section 4.7 of this chapter, the county auditor shall, upon the request of the purchaser or the purchaser's assignee; file a verified petition in the same court and under the same cause number in which the judgment of sale was entered asking the court to direct the county auditor to issue a tax deed if the real property is not redeemed from the sale. Notice of the filing of this

petition shall be given to the same parties and in the same manner as provided in section 4.5 of this chapter, except that, if notice is given by publication, only one (1) publication is required. The notice required by this section is considered sufficient if the notice is sent to the address required by section 4.5(d) of this chapter. Any person owning or having an interest in the tract or real property may file a written objection to the petition with the court not later than thirty (30) days after the date the petition was filed. If a written objection is timely filed, the court shall conduct a hearing on the objection.

(b) Not later than sixty-one (61) days after the petition is filed under subsection (a), the court shall enter an order directing the county auditor (on the production of the certificate of sale and a copy of the order) to issue to the petitioner a tax deed if the court finds that the following conditions exist:

(1) The time of redemption has expired.

(2) The tract or real property has not been redeemed from the sale before the expiration of the period of redemption specified in section 4 of this chapter.

(3) Except with respect to a petition for the issuance of a tax deed under a sale of the certificate of sale on the property under IC 6-1.1-24-6.1, all taxes and special assessments, penalties, and costs have been paid.

(4) The notices required by this section and section 4.5 of this chapter have been given.

(5) The petitioner has complied with all the provisions of law entitling the petitioner to a deed.

The county auditor shall execute deeds issued under this subsection in the name of the state under the county auditor's name. If a certificate of sale is lost before the execution of a deed, the county auditor shall issue a replacement certificate if the county auditor is satisfied that the original certificate existed.

(c) Upon application by the grantee of a valid tax deed in the same court and under the same cause number in which the judgment of sale was entered, the court shall enter an order to place the grantee of a valid tax deed in possession of the real estate. The court may enter any orders and grant any relief that is necessary or desirable to place or maintain the grantee of a valid tax deed in possession of the real estate.

(d) Except as provided in subsections (e) and (f), if:

(1) the verified petition referred to in subsection (a) is timely filed; and

(2) the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure of the petitioner under subsection (a) to fulfill the notice requirement of subsection (a);

the court shall order the return of the amount, if any, by which the purchase price exceeds the minimum bid on the property under IC 6-1.1-24-5(e) minus a penalty of twenty-five percent (25%) of that excess. The petitioner is prohibited from participating in any manner in the next succeeding tax sale in the county under IC 6-1.1-24. The county auditor shall deposit

penalties paid under this subsection in the county general fund.

(e) Notwithstanding subsection (d), in all cases in which:

(1) the verified petition referred to in subsection (a) is timely filed;

(2) the petitioner under subsection (a) has made a bona fide attempt to comply with the statutory requirements under subsection (b) for the issuance of the tax deed but has failed to comply with these requirements;

(3) the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the
failure to comply with these requirements; and

(4) the purchaser, the purchaser's successors or assignees, or the purchaser of the certificate of sale under IC 6-1.1-24 files a claim with the county auditor for refund not later than thirty (30) days after the entry of the order of the court refusing to direct the county auditor to execute and deliver the tax deed; the county auditor shall not execute the deed but shall refund the purchase money minus a penalty of twenty-five percent (25%) of the purchase money from the county treasury to the purchaser, the purchaser's successors or assignees, or the purchaser of the certificate of sale under IC 6-1.1-24. The county auditor shall deposit penalties paid under this subsection in the county general fund. All the delinquent taxes and special assessments shall then be reinstated and recharged to the tax duplicate and collected in the same manner as if the property had

not been offered for sale. The tract or item of real property, if it is then eligible for sale under IC 6-1.1-24, shall be placed on the delinquent list as an initial offering under IC 6-1.1-24.

(f) Notwithstanding subsections (d) and (e), the court shall not order the return of the purchase price or any part of the purchase price if:

(1) the purchaser or the purchaser of the certificate of sale under IC 6-1.1-24 has failed to provide notice or has provided insufficient notice as required by section 4.5 of this chapter; and

(2) the sale is otherwise valid.

(g) A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances created or suffered before or after the tax sale except those liens granted priority under federal law, and the lien of the state or a political subdivision for taxes and special assessments that accrue subsequent to the sale. However, the estate is subject to all easements, covenants, declarations, and other deed restrictions and laws governing land use, including all zoning restrictions and liens and encumbrances created or suffered by the purchaser at the tax sale. The deed is prima facie evidence of:

(1) the regularity of the sale of the real property described in the deed;

(2) the regularity of all proper proceedings; and

(3) valid title in fee simple in the grantee of the deed.

(h) A tax deed issued under this section is incontestable except by appeal from the order of the

court directing the county auditor to issue the tax deed filed not later than sixty (60) days after the date of the court's order

Indiana Code Section 6-1.1-25-16 provides:

A person may, upon appeal, defeat the title conveyed by a tax deed executed under this chapter only if:
(1) the tract or real property described in the deed was not subject to the taxes for which it was sold;
(2) the delinquent taxes or special assessments for which the tract or real property was sold were paid before the sale;
(3) the tract or real property was not assessed for the taxes and special assessments for which it was sold;
(4) the tract or real property was redeemed before the expiration of the period of redemption (as specified in section 4 of this chapter);
(5) the proper county officers issued a certificate, within the time limited by law for paying taxes or for redeeming the tract or real property, which states either that no taxes were due at the time the sale was made or that the tract or real property was not subject to taxation;
(6) the description of the tract or real property was so imperfect as to fail to describe it with reasonable certainty; or
(7) the notices required by IC 6-1.1-24-2, IC 6-1.1-24-4, and sections 4.5 and 4.6 of this chapter were not in substantial compliance with the manner prescribed in those sections.

STATEMENT OF THE CASE

A. Facts

Petitioner seeks review of the ruling of the Indiana Court of Appeals holding that Swami had waived its right to challenge any due process deficiencies of notice in issuance of a tax deed for its property by failing to raise that issue at a time when Indiana judicial precedent was such that such a challenge would have been futile if not frivolous.

In the Trial Court the parties submitted a list of stipulated facts to the trial court, in lieu of an evidentiary hearing, addressing whether the Auditor provided Swami with Constitutionally adequate notice of the tax sale of its property under the United State Supreme Court's decision in *Jones v. Flowers*. The complete list of the facts stipulated to by the parties and adopted by the Trial Court is as follows:

Plaintiffs, by counsel, Defendant Swami, Inc. ("Swami"), by counsel, and Intervenor Thelma Retz, by counsel, stipulate and agree to the following facts regarding the Court's determination on Swami's Trial Rule 60(B) Motion:

1. In May of 1999, Swami, Inc. ("Swami") was formed for the purpose of investing in real estate.

2. At all relevant times, Swami's principal place of business was the same as the residence of Subhash Reddy ("Subhash"), Swami's President.

3. At all relevant times, Swami's investors included three physicians and a realtor.

4. In June of 1999, Swami purchased sixty-three (63) acres of real estate comprised of a forty (40) acre parcel and an abutting twenty-three (23) acre parcel. The forty acre parcel is located at 9019 Illinois Road, Fort Wayne, Allen County, Indiana. The twenty-three acre parcel is located at 9100 Illinois Road, Fort Wayne, Allen County, Indiana.

5. At all relevant times, the Allen County Auditor's Office (the "Auditor's Office") used a Key Number System to identify parcels of real property.

6. At all relevant times, the twenty-three acre parcel of real estate was carried by the Auditor's Office as Key Number 11-0011-0010 (the "Real Estate").

7. The Real Estate is an approximately twenty-three acre parcel of unimproved real property and is taxed separately as such.

8. As a matter of procedure, on or before July 1 of any given tax year, the Allen County Treasurer certifies a delinquency list, created by the Auditor's Office, of any and all real estate to be placed in a fall tax sale.

9. Real estate may be certified for tax sale only after the real property taxes and/or special assessments on a parcel of real estate are delinquent from the previous year's spring tax installment.

10. As of July 1, 2002, the real property taxes for the Real Estate were delinquent from the previous year's spring installment.

11. As of July 1, 2002, no taxes had been paid on the Real Estate since May 10, 2000.

12. On or around July 1, 2002, the Real Estate was certified for placement in the 2002 Allen County Tax Sale.

13. For each property that is certified for placement in a tax sale, the Auditor's Office prepares a written notice of the tax sale ("Notice of Tax Sale") and sends the Notice of Tax Sale by certified mail to the property owner of record at the owner's last known address of record as indicated by the records of the Auditor's Office.

14. Since June of 1999, the owner for the Real Estate as indicated by the records of the Auditor's Office was Swami.

15. When the Auditor's Office prepared and sent the Notice of Tax Sale for the Real Estate, Swami's address as indicated by the records of the Auditor's Office was 1311 Dell Cove Dr., Fort Wayne, Indiana 46804 (the "Dell Cove address").

16. On or about July 23, 2002, the Auditor's Office sent the Notice of Tax Sale to Swami by certified mail to the Dell Cove address.

17. At one time, Subhash lived at the Dell Cove address. However, Subhash and his wife moved from the Dell Cove address in 1999.

18. The Reddys changed residences (and therefore Swami's principal place of business) four times during the three-and-a-half period following Swami's purchase of the Real Estate.

19. A property owner who wishes to change his or her address of record at the Auditor's Office, other than by deed, must complete a form Change of Address Affidavit or provide a letter with the taxpayer's new information. To effect the address change, both the form Change of Address Affidavit and the letter must be notarized when given to the Auditor's Office.

21. On or about November 15, 1999, five months after Swami's purchase of the Real Estate, Subhash submitted a Change of Address Affidavit to the Auditor's Office for five properties that he personally owned.

22. At no time relevant did Swami file a notarized Change of Address Affidavit or notarized letter seeking a change of address for Swami with the Auditor's Office.

23. At all relevant times, a United States Postal Service customer who wished to have his or her mail forwarded was required to file a change of address form with the post office. After the change of address form was filed, the USPS would forward mail - including certified mail -- for a period of one year. After the one-year forwarding period expired, the USPS would not deliver mail - including certified mail - to the former address, nor would it forward such mail to the new address.

24. The Notice of Tax Sale sent to Swami at the Dell Cove address was returned to the Auditor's Office marked "Returned to Sender - Undeliverable as Addressed - Unable to Forward."

25. When the certified mailing of the Notice of Tax Sale addressed to Swami at the Dell Cove address was returned, the Auditor's Office searched its records and the local phone book, but found no other address for Swami.

26. At all relevant times, Swami was not listed in any phone book. However, Subhash Reddy was listed as Swami's registered agent for service of process in Swami's Articles of Incorporation filed with the Indiana Secretary of State. The address listed for Subhash on the Articles of Incorporation filed with the Indiana Secretary of State is the Dell Cove address.

27. In searching its own records, the Auditor's Office did discover, through a name search, that Swami owned an adjacent real estate parcel, located at the physical address of 9019 Illinois Road, Fort Wayne, Indiana 46804 (the "Illinois Road address").

28. According to the records of the Auditor's Office, the Illinois Road address contained an improvement to the real estate.

29. On August 21, 2002, in a further attempt to notify Swami of the tax sale, the Auditor's Office sent, by certified mail, a second Notice of Tax Sale to Swami at the Illinois Road address.

30. Unbeknownst to the Auditor's Office, the improvement on the Illinois Road address was an unused and dilapidated barn. Moreover, there was no mailbox at the address, so there was no place to deliver mail there. However, the Auditor's Office

was not aware, at any relevant time, that there was no mailbox at the Illinois Road address.

31. At all relevant times, there was no structure of any kind on the Real Estate, nor was there any mailbox.

32. The certified mailing of the Notice of Tax Sale addressed to Swami at the Illinois Road address was returned marked "'Returned to Sender - No Such Number."

33. Prior to the 2002 fall tax sale, the Auditor's Office posted additional notice of the tax sale at a public place of posting in the county courthouse or in another public county building at least twenty-one (21) days before the earliest date of application for judgment. The Auditor's Office further published notice of the tax sale once each week for three (3) consecutive weeks in the Fort Wayne Journal Gazette and the Fort Wayne News Sentinel newspapers.

34. Following the return of the Tax Sale Notice, the Auditor's Office did not attempt the following:

a. To search the records of any other Allen County department for alternative addresses for Swami;

b. To search the Indiana Secretary of State's records for the registered agent for Swami or an alternative address for Swami;

c. To send notice to the Dell Cove address, the Real Estate or the Illinois Road address by regular first class mail;

d. To re-send notice addressed to "occupant" or "property owner" to the Dell Cove address;

e. To send notice addressed to "occupant" or "property owner" to the Real Estate;

f. To send notice addressed to "occupant" or property owner" to the Illinois Road address;

g. To visit the Real Estate; or

h. To post notice on the Real Estate.

35. At all relevant times, the records at the Auditor's Office reflected Subhash and Jyothirmai Reddy as the owners of the Dell Cove address. The Auditor's Office is not sure whether a search of its records was performed for the owner of the Dell Cove address.

36. On or about August 22, 2002, Jyothirmai Reddy, the wife of Subhash, received a notice of tax sale for the Reddys' personal residence located at 10609 Callendar Court, Fort Wayne, Indiana.

37. In response to the notice, Jyothirmai and two friends went to the Allen County Treasurer's Office to attempt to prevent the tax sale of the Reddys' residence.

38. While at the Treasurer's Office, Jyothirmai discovered there were taxes due and owing on other properties owned by the Reddys.

39. On August 22, 2002, Jyothirmai obtained and tendered a certified check in the amount of $9,166.34 for the taxes owed on properties owned by the Reddys that were scheduled for tax sale. That same day, Jyothirmai obtained and tendered a certified check in the amount of $14,616.77 for taxes owed on other properties owned by the Reddys that were not scheduled for tax sale.

40. The 2002 Allen County Fall Tax Sale took place on September 18, 2002.

41. At the public tax sale, the Real Estate was sold to Thelma Retz ("Retz").

42. Retz was issued a Certificate of Sale for the Real Estate by the Auditor's Office.

43. On or about September 19, 2002, Retz brought current all of the delinquent taxes and unpaid fees for the Real Estate.

44. As the highest bidder at tax sale, Retz paid Eighteen Thousand Dollars ($18,000.00) for the Real Estate. An appraisal of the Real Estate valued the property at more than Five Hundred Thousand Dollars ($500,000.00).

45. The amount paid by Retz for the Real Estate was in excess of the amount owed for the delinquent taxes and fees, creating a surplus of Sixteen Thousand Nine Hundred and Twenty-Eight Dollars and Twenty Cents ($16,928.20), from which the Auditor's Office paid One Thousand Six Hundred and Sixty-Six Dollars and Fifty-Four Cents ($1,666.54) to satisfy delinquent real property taxes for the Illinois Road property also owned by Swami. The remaining surplus amount ($15,261.66) ("the Surplus") was held in an account by the Allen County Treasurer's Office.

46. On December 10, 2003, the Surplus was claimed and paid out in its entirety to National Cash Refund, Inc., the agent retained by Swami to collect the Surplus fund.

47. A true and accurate copy of the Accounts Payable Voucher releasing a check for the Surplus fund in the amount of $15,261.66 (the "Surplus Fund Check") under Warrant Number 318498 was attached as "Exhibit F to the stipulation

48. According to the records contained in the Auditor's Office, the Surplus Fund Check dispersed to Swami's agent, National Cash Refund, Inc., was cashed on or about December 16, 2003

49. Once a property is sold at tax sale in Allen County, the owner or an interested party may "redeem" the property by paying to the county treasurer the amount required for redemption (including, but not limited to, the delinquent taxes and fees) at anytime during the one year period immediately following the date of the tax sale.

50. The Auditor's Office may petition for a tax deed after one (1) year has elapsed from the date of the tax sale.

51. Once a property is sold at tax sale in Allen County, the Auditor's Office hires a title company to perform a title search on the property to identify all persons with a substantial interest of public record therein.

52. After Retz purchased the Real Estate, a title search was performed thereon (the "title search").

53. The title search showed Mid Am Bank as the only person with a substantial property interest of public record for the Real Estate.

54. On May 28, 2003, during the redemption period, the Auditor's Office sent Notice to Owner and Interested Parties of Sale of Real Estate for Unpaid Real Estate Property Taxes: Fall 2002 Tax Sale (the "Notice of Sale of Real Estate") to Swami at the Dell Cove address.

55. The certified mailing of the Notice of Sale of Real Estate addressed to Swami at the Dell Cove address was returned to the Auditor's Office marked "Returned to Sender - Not Deliverable as Addressed - Unable to Forward."

56. On May 28, 2003, during the redemption period, the Auditor's Office also sent the Notice of Sale of Real Estate to Mid Am Bank, the mortgagee of record, to its last known address of 519 Madison Avenue, Toledo, Ohio 43 804 (the "Madison Avenue address").

57. On May 30, 2003, the certified mailing of the Notice of Sale of Real Estate addressed to MidAm Bank at the Madison Avenue address was delivered and signed for by Marie Douglas.

58. Following the return of the Notice of Sale of Real Estate sent to Swami, the Auditor's Office did not attempt the following:

a. To search the records of any other Allen County department for alternative addresses for Swami;

b. To search the Indiana Secretary of State's records for the registered agent for Swami or an alternative address for Swami;

c. To send notice to the Dell Cove address, the Real Estate or the Illinois Road address by regular first class mail;

d. To re-send notice addressed to "occupant" or "property owner" to the Dell Cove address;

e. To send notice addressed to "occupant" or "property owner" to the Real Estate;

f. To send notice addressed to "occupant" or "property owner" to the Illinois Road address;

g. To visit the Real Estate; or

h. To post notice on the Real Estate.

59. The one-year redemption period for the Real Estate expired on September 18, 2003.

60. No one redeemed the Real Estate during the one-year redemption period.

61. When a real estate property is not redeemed within the one-year redemption period, the Auditor's Office may petition the court for a tax deed in the name of the purchaser of the tax delinquent property.

62. On October 7, 2003, after the redemption period for the Real Estate had expired, the Auditor's Office sent a "Notice of Petition for a Tax Deed - Fall 2002 Tax Sale" ("Notice of Petition for Tax Deed") to Swami at the Dell Cove address and to Mid Am Bank and the Madison Avenue address.

63. The certified mailing of the Notice of Petition for Tax Deed addressed to Swami at the Dell Cove address was returned to the Auditor's Office marked "Returned to Sender."

64. On October 9, 2003, the certified mailing of the Notice of Petition for Tax Deed addressed to MidAm Bank at the Madison Avenue address was delivered and signed for by Marie Douglas.

65. Following the return of the Notice of Petition for Tax Deed sent to Swami, the Auditor's Office did not attempt the following:

a. To search the records of any other Allen County department for alternative addresses for Swami;

b. To search the Indiana Secretary of State's records for the registered agent for Swami or an alternative address for Swami;

c. To send notice to the Dell Cove address, the Real Estate or the Illinois Road address by regular first class mail;

d. To re-send notice addressed to "occupant" or "property owner" to the Dell Cove address;

e. To send notice addressed to "occupant" or "property owner" to the Real Estate;

f. To send notice addressed to "occupant" or property owner" to the Illinois Road address;

g. To visit the Real Estate; or

h. To post notice on the Real Estate.

66. On or about October 8, 2003, the Auditor's Office filed a petition with the Allen County Circuit Court requesting authority to issue a tax deed for the Real Estate to Retz.

67. On or about November 14, 2003, the Court issued an Order finding that the requisite conditions had been satisfied for the issuance of a tax deed for the Real Estate.

69. On or about November 24, 2003, The Auditor's Office transferred and conveyed to Retz a Tax Title Deed (``Tax Deed") for the Real Estate. The Tax Deed was properly recorded in the Office of the Recorder of Allen County as Document #203120413.

B. Statement of Proceedings and Disposition in the Courts Below

This matter was commenced on August 28, 2002 as a proceeding for the Tax Sale of various parcels of real estate in Allen County, Indiana. One of the properties sold at Tax Sale by Allen County was the subject parcel owned by Petitioner. On or about October 8, 2003 the Allen County Auditor filed a Petition with the Trial Court for authority to issue a tax deed to the subject real estate to Respondent Retz. On or about November 14, 2003 the Allen Circuit Court issued an order granting Retz a Tax Deed for the real estate. After learning of the Tax Sale of the property and issuance of a Tax Deed on January 12, 2004 Swami filed a Verified Objection to Issuance of a Tax Deed. On August 5, 2005 the Trial Court overruled Swami's objection to issuance of a Tax Deed and Swami took an appeal to the Indiana Court of Appeals. On February 8, 2006 the Indiana Court of Appeals issued its opinion for publication reported at 841 N.E.2d 1173 (Ind.Ct.App. 2006)(Trans.Den.). The Indiana Court of Appeals there held that the only basis for a valid objection to issuance of a Tax Deed are those

specifically enumerated in I.C. 6-1.1-25-16 and that since Swami's objection did not specifically recite any of the enumerated objections there was no basis for setting aside the Tax Deed. The Court of Appeals further held that Swami was not entitled to relief based upon its reliance upon a misrepresentation of an employee in the County Treasurer's Office because Swami had failed to file a change of address form. The Indiana Court of Appeals further analyzed Swami's procedural and substantive due process arguments based solely upon Indiana Cases dealing strictly with substantive due process rights and held that the Indiana Tax Sale Statute was facially constitutional and constitutional as applied. On March 8, 2006 Swami filed a Petition to Transfer to the Indiana Supreme Court. On April 26, 2006 this Court decided the case of *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d. 415 (2006) in which it addressed the issue of constitutionally sufficient notice in tax sale cases such as this. On May 16, 2008 Swami filed a Motion to Remand the matter to the Trial Court in light of this Court's ruling in the *Jones* case. On July 6, 2006 the Indiana Supreme Court unanimously declined jurisdiction and failed to rule on Swami's Motion to Remand.

On August 25, 2006, Swami filed a Motion for Relief from Judgment under Indiana Trial Rule 60(B), which is the Indiana counterpart to Federal Rule of Civil Procedure 60(b). On December 7, 2006 the trial judge entered an order granting

Swami's Rule 60(B) motion "in part subject to Findings of Fact and Conclusions of Law filed by separate order." On December 13, 2006 the Trial Court issued its judgment upon Swami's Trial Rule 60(B) motion. On April 11, 2007 the parties filed their Stipulation Facts as to Swami's Trial Rule 60(B) motion and on May 15, 2007 the Trial Court set aside Retz's Tax Deed. Retz filed her Notice of Appeal on June 1, 2007. After briefing the Court of Appeals issued its Memorandum decision on January 25, 2008 holding that this Court's ruling in Jones had no effect on Indiana law, that all of Swami's arguments based upon *Jones* were available prior to this Court's ruling in *Jones* and therefore those arguments were all waived by virtue of having not been raised initially in attacking the validity of the Tax Deed. The Court further expanded upon that holding in its Memorandum Decision on Rehearing of April 1, 2008. On May 1, 2008 Swami filed its Petition to Transfer to the Indiana Supreme Court which was denied on July 10, 2008.

REASONS FOR GRANTING OF THE PETITION

A. The Indiana Court of Appeals Sidestepped Constitutional Review of Indiana Tax Sale Procedure Under the *Jones* Case by Improperly Finding Implied Waiver

At the time Swami's first appeal was decided it was very well settled in Indiana that a person

could only defeat a Tax Title Deed by proving one of the seven (7) defects enumerated in I.C. 6-1.1-25-16 which are as follows:

A person may, upon appeal, defeat the title conveyed by a tax deed executed under this chapter only if:
(1) the tract or real property described in the deed was not subject to the taxes for which it was sold;
(2) the delinquent taxes or special assessments for which the tract or real property was sold were paid before the sale;
(3) the tract or real property was not assessed for the taxes and special assessments for which it was sold;
(4) the tract or real property was redeemed before the expiration of the period of redemption (as specified in section 4 of this chapter);
(5) the proper county officers issued a certificate, within the time limited by law for paying taxes or for redeeming the tract or real property, which states either that no taxes were due at the time the sale was made or that the tract or real property was not subject to taxation;
(6) the description of the tract or real property was so imperfect as to fail to describe it with reasonable certainty; or
(7) the notices required by IC 6-1.1-24-2, IC 6-1.1-24-4, and sections 4.5 and 4.6 of this chapter were not in substantial compliance with the manner prescribed in those sections. *Nieto v. Kezy*, 846 N.E.2d 327, 337-338 (Ind.Ct.App. 2006), *Whalen v. M. Doed, LLC*, 859 N.E.2d 368, 373 (Ind.Ct.App.

2006), *Swami Inc. v. Lee,* 841 N.E.2d 1173, 1176-1177 (Ind.Ct.App. 2006)(Trans.Den.), *Leininger v. Green,* 596 N.E.2d 955, 958 (Ind.Ct.App. 1992)(Trans.Den.).

The Indiana Court of Appeals noted that "§ 16 must be strictly applied", *Swami Inc,* 841 N.E.2d at 1177. Consequently, the rule at that time was that the notice required by the statute merely be in substantial compliance with the manner prescribed by the Tax Sale Statute, *Elizondo v. Read,* 588 N.E.2d 501, 504-505 (Ind. 1992), *Diversified Invesments LLC v. U.S. Bank NA,* 838 N.E.2d 536, 542 (Ind.Ct.App. 2005)(Trans.Den.), *Schaefer v. Kumar,* 804 N.E.2d 184, 191 (Ind.Ct.App. 2004)(Trans.Den.). Based upon these many authorities of Indiana Courts it is clear that any due process constitutional challenge available to Swami prior to the *Jones* case was illusory at best and could have been characterized as frivolous under Indiana precedent.

The Indiana Court of Appeals in brushing aside Swami's constitutional due process claims of insufficient notice held that this Court's ruling in *Jones* did not effect any substantial change in Indiana law, (App. A, pp. 18-19, n. 12). This proclamation by the Indiana Court of Appeals is contrary to the language of the *Jones* case itself wherein the opinion specifically cites Indiana Supreme Court authority which is contra to this Court's holding in *Jones*. *Jones v. Flowers,* 547

U.S. 220, 227, 126 S.Ct. 1708, 1715 164 L.Ed.2d. 415, 426 (2006)(citing *Elizondo v. Read*, 588 N.E.2d 501, 504 (Ind. 1992).

The Indiana Court of Appeals' conclusion that the *Jones* case did not change Indiana law is undermined by the holding of the first Swami appeal when considered in light of the *Jones* case. In the first, pre *Jones* case, the Indiana Court of Appeals held that, notwithstanding the fact that Swami had been misinformed by the County Auditor's office, since Swami had failed to file a change of address notice it had forfeited its right to constitutionally sufficient notice, had waived the right to object to lack of notice and to rely upon information provided by the Auditor's office, *Swami Inc. v. Lee,* 841 N.E.2d 1173, 1178-1179 (Ind.Ct.App. 2006) (Trans.Den.). This Court stated in this regard in *Jones*: "The Commissioner does not argue that Jones' failure to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree". *Jones*, 547 U.S. at 232, 126 S.Ct. at 1717, 164 L.Ed.2d at 429. This Court's statement constitutes a specific rejection of the operative holding of the first Swami appeal.

Notwithstanding the futility which would have met Swami having raised the issue of the due process violation effected by lack of notice prior to this Court's holding in *Jones*, the Indiana Court of Appeals side stepped analyzing operation of Indiana's tax sale statute in light of *Jones* by finding

a presumed waiver of Swami's constitutional due process right to notice. The law does not presume the waiver of constitutional rights, *Lake James Fire Department, Inc. v. Burke County N.C.* 149 F.3d 277, 280 (4th Cir. 1998), *Gete v. I.N.S.*, 121 F.3d 1285, 1293 (9th Cir. 1997). There is a presumption against waiver of due process rights, *Johnson v. U.S. Department of Agriculture,* 734 F.2d 74, 784 (11th Cir. 1984), *Monsanto v. Ruckelshaus,* 753 F.2d 649, 654 (8th Cir. 1985). An effective waiver of a constitutional right has been expressed as an "intentional relinquishment or abandonment of a known right or privilege", *Atorie Air v. F.A.A.*, 942 F.2d 954, 959 (5th Cir. 1991), *Domka v. Portage County* Wisconsin, 523 F.3d 776, 781-788 (7th Cir. 2008) In *re Midway Airlines, Inc.* 383 F.3d 663. 671 (7th Cir. 2004), *U.S. v. Mantas*, 274 F.3d 1127, 1130 (7th Cir. 2001), *In re RFE Industries, Inc* 283 F.3d 159 (3rd Cir. 2002). A waiver of a due process right must be voluntarily, intelligently and knowingly made with sufficient awareness of the relevant circumstances and likely consequences, *Martin v. Amoco Oil Co.*, 679 N.E.2d 139, 144-145 (Ind.Ct.App. 1997)(affirmed in relevant part, *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 386 (Ind. 1998)), *Nose v. Attorney General of U.S.*, 993 F.2d 75, 79 (5th Cir. 1993), *Lake James Fire Department, Inc.* 149 F.3d at 280, *Doe v. Pennsylvania Board of Probation and Parole*, 513 F.3d 95, 99 (3rd. Cir. 2008). In both criminal and civil cases due process rights may ordinarily be waived only if it is established by clear and convincing evidence that the

waiver is voluntary, knowing and intelligent, *Gete*, 121 F.3d at 1293. A claimed waiver of the constitutional right to due process is examined with the strictest of scrutiny, *Atorie Air v. F.A.A.*, 942 F.2d at 959. Courts indulge every reasonable presumption against waiver, *Id, Gete v. I.N.S.*, 121 F.3d at 1293, *Nose v. Attorney General of U.S.* 993 F.2d at 79. The record here contains no evidence that Swami voluntarily, knowingly or intelligently waived due process or other constitutional rights. The 5th Circuit specifically rejected the Indiana Court of Appeals' approach in its reliance upon the legal fiction of implied waiver of due process rights to cure constitutional defects in notice. *Davis Oil Co. v. Mills*, 873 F.2d 774, 788 (5th Cir. 1989). This court should grant Certiorari and incorporate such a holding in its opinion.

The lack of constitutionally adequate notice constituted a jurisdictional defect rendering the tax deed void. At the very beginning of the opinion Chief Justice Roberts writes "**Before** [emphasis added] a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'". *Jones v. Flowers*, 547 U.S.at 222, 126 S.Ct. at 1712, 164 L.Ed.2d. at, 423. Requiring notice "before" selling property for unpaid taxes necessarily therefore makes notice a jurisdictional prerequisite. Constitutionally inadequate notice to the owner of a

property sold at a tax foreclosure is a jurisdictional defect. *Benoit v. Panthaky*, 780 F.2d 336, 339 (3rd Cir. 1985). This jurisdictional concept applies to statutory notice requirements as well. *In Re: Sienkiewicz*, 900 F.2d 206, 208 (9th Cir. 1990), *In Re: Foreclosure of liens*, 922 P.2d 73, 76 (Wash. 1996), *Van Raben Homes Inc. v. Dakota View Estates*, 546 N.W.2d 843, 847 (N.D. 1996). This jurisdictional defect is not waived by failure to redeem. *Van Raben Homes Inc.*, 546 N.W.2d at 846-847. In such circumstances the tax sale and tax deed are void. *In Re: Foreclosure of Liens*, 922 P.2d at 76, *In Re: Sienkiewicz*, 900 F.2d at 208, (see also *F.D.I.C. v. Lee*, 130 F.3d 1139, 1143 (5th Cir. 1997) (holding tax sale of property void because sheriff's failure to give statutorily required notice to and obtain consent of F.D.I.C.). The statute of limitations for an action to set aside a tax sale will not run for a sale conducted without constitutionally adequate notice. *Grobien v. Lombardy*, 765 F.Supp 856, 859 (D.Virgin Islands 1991)(upholding delay of 6 years in challenge to tax deed). These authorities teach that the finding of implied waiver by the Indiana Court of Appeals does not remedy the due process violation occasioned by the failure of notice, does not trump Swami's due process right to notice nor resurrect a void judgment for issuance of a tax deed. A claim that a judgment is void necessarily implicates an attack on the trial court's personal or subject matter jurisdiction. *Dusenberry v. Dusenberry*, 625 N.E.2d 458, 461-462 (Ind.Ct.App. 1993). Judgment rendered in violation of due

process is void, *Stidham v. Whelchel*, 698 N.E2d. 1152, 1154 (Ind. 1998) Such judgments may be collaterally attacked at any time. *Id.* at 1156. As this case demonstrates, this rule applies to everyone except those whose property is subject to tax sale.

The record in this matter itself demonstrates the absurdity of the Indiana Court of Appeals' presumption of waiver of Swami's constitutional rights. The Indiana Court of Appeals position is apparently based upon the illogical proposition that Swami, at a time when its property could be redeemed for a modest amount, sat idly by and knowingly, willingly did nothing instead electing to litigate this matter all the way to the United States Supreme Court after the fact. The fact that Swami has so consistently and vigorously contested this matter all the way up to this honorable Court shows that Swami has been ready, willing and able to pay the taxes and would have but for the insufficiency of notice.

B. This Court's opinion in *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d. 415, 426 (2006) and other Courts in Conformity with the *Jones* Opinion are Dispositive on the Merits of this Matter.

The evidence stipulated in the Trial Court was of the effect that the only "notice" given Swami prior to the tax sale came back "Returned to Sender - Undeliverable as Addressed - Unable to Forward"

and "Returned to Sender - No Such Number". After the tax sale "notice" was sent to the same address as before, coming back "Returned to Sender - Not Deliverable as Addressed - Unable to Forward" and "Returned to Sender". Before taking an action which will affect an interest in life, liberty or property protected by the due process of the Fourteenth Amendment the State must provide notice reasonably calculated under the circumstances to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections. *Yoder v. Elkhart County Auditor*, 632 N.E.2d 369, 372 (Ind. 1994) (Trans.Den.) (Cert.Den.), *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795, 77 L.Ed.2d 180, 185, 103 S.Ct. 2706 (1983). While the County also provided notice by publication that, by itself, is insufficient, *Id.* Published notice alone in the absence of actual notice is no more than feint, *Id.* Noting many State and Federal Courts have reached the same conclusion, this Court has specifically held that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold at tax sale. *Jones v. Flowers*, 547 U.S. 220, 225, 126 S.Ct. 1708, 1713, 164 L.Ed.2d. 415, 425 (2006)(citations omitted). Of significance here, Chief Justice Roberts then went on to point out that Indiana law is not in accord with this Court's holding in *Jones*. 547 U.S. at 227, 126 S.Ct. at 1715, 164 L.Ed.2d at 426, (citing *Elizondo v. Read*, 588 N.E.2d 501, 504 (Ind. 1992)). The proceedings

below clearly illustrate that the Courts of the State of Indiana do not adhere to this Court's holding in the *Jones v. Flowers* case cited above. The members of this Court commented in *Jones* that they would not think that one who actually desired to inform a real property owner of an impending tax sale of his property would do nothing more when a certified letter sent to the owner is returned unclaimed. *Id.* 547 U.S. at 229, 126 S.Ct. at 1716, 164 L.Ed.2d at 427. There, this Court rejected as sufficient notice that consisted of no more than unclaimed certified mail. *Jones v. Flowers*, 547 U.S. at 225, 126 S.Ct. at 1713, 164 L.Ed.2d at 425. There, one notice was sent by certified mail and came back unclaimed, notice was given by publication and then a second notice was sent by certified mail and also came back unclaimed. *Id.* 547 U.S. at 223-224, 126 S.Ct. at 1712, 164 L.Ed.2d at 424. This was found to be insufficient notice thus effecting a procedural due process violation. *Id.* 547 U.S. at 225, 239, 126 S.Ct. at 1713, 1721, 164 L.Ed.2d at, 423, 434, (see also *Luessehnop v. Clinton County, New York*, 466 F.3d 259, 270 (2nd Cir. 2006) applying *Jones v. Flowers*) and *Plemons v. Gale*, 396 F.3d 569, 573 (4th Cir. 2004)). State courts have reached the same result. *Bank of America v. Giant*, 93 Cal.Rptr. 2d 626, 631-632 (Cal.Ct.App. 2000), *St. George Antiochian Christian Church v. Aggarwal*, 603 A.2d 484, 490 (Md. 1992).

The course of events as to notice here are practically identical with those in *Jones* if not even more troubling since the notices sent here could not

have been claimed because they were returned as undeliverable which strongly suggesting a bad address as opposed to unclaimed which could simply result from one failing to pick up their certified mail from the post office.

This Court's decision in *Jones* is significant to this case in yet another fundamental way. As noted above, in the first, pre *Jones* case, the Indiana Court of Appeals held that, notwithstanding the fact that Swami had been misinformed by the County Auditor's office, since Swami had failed to file a change of address notice it had forfeited its right to constitutionally sufficient notice, to object to lack of notice and to rely upon information provided by the Auditor's office, *Swami Inc. v. Lee,* 841 N.E.2d 1173, 1178-1179 (Ind.Ct.App. 2006) (Trans.Den.). This Court stated in this regard in *Jones*: "The Commissioner does not argue that Jones' failure to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree". *Jones*, 547 U.S. at 232, 126 S.Ct. at 1717, 164 L.Ed.2d at 429. This argument that the Arkansas Land Commissioner prudently chose not to advance is just what the Indiana Court of Appeals has declared to be the law of Indiana, *Swami Inc.*, 841 N.E.2d at 1178-1179. Indiana's approach has been universally rejected by this and other courts. A party's ability to take steps to safeguard its interests does not relieve the state of its constitutional obligations. *Jones v. Flowers*, *Jones*, 547 U.S. at 232, 126 S.Ct. at 1717, 164 L.Ed.2d at 429,

Mennonite Board of Missions v. Adams, 462 U.S. at 799, 77 L.Ed.2d at 188, *Plemons v. Gale*, 396 F.3d at 574, *Schwartz v. Dey*, 665 S.W.2d 933, 935 (Mo.banc. 1984), *O'Brien v. Port Lawrence Title and Trust Company*, 688 N.E.2d 1136, 1141 (Ohio.Com.Pl. 1997), *Grobien v. Lombardy*, 765 F.Supp. at 860. Even if it could be argued that, with the benefit of 20-20 hindsight, it appears that Swami could have and should have more diligent in seeking to save its property from tax sale, the fact that an owner should have been more diligent does not excuse constitutionally inadequate notice. *Jones*, 547 U.S. at 234, 126 S.Ct. at 1718, 164 L.Ed.2d at 430.

This case teaches that, rather than considering the drastic remedy of tax sale as a last resort to collect delinquent taxes, Indiana Courts apply Indiana's tax sale statute in such a way as to promote alienation of as much property as possible from the hands of taxpayers who have, for whatever reason, fallen behind in their taxes to the hands of tax sale investors. Indiana Courts have never recognized the concept which should be intuitive and which other jurisdictions have specifically recognized and articulated, that the primary purpose of the tax sale law is not to divest owners of their property, but to provide a method for collecting taxes, *Sonderman v. Remington Construction Company Inc.*, 603 A.2d 1, 8 (N.J. 1992). Justice Flaherty of the Pennsylvania Supreme Court articulated this principle very eloquently stating:

> "Somehow, over the years, taxing authorities have lost sight of the fact that it is a momentous event under the United States and Pennsylvania Constitutions when a government subjects a citizen's property to forfeiture for non-payment of taxes. We have had occasion before to note that we hold no brief with wilful, persistent and long standing tax delinquents, but at the same time, we have also observed that the "strict provisions of the Real Estate Tax Sale Law were never meant to punish taxpayers who omitted through oversight or error...to pay their taxes." *Ross Appeal*, 366 Pa. 100, 107, 76 A.2d 749, 753 (1950). As this Court stated in *Hess v. Westerwick*, "the purpose of tax sales is not to strip the taxpayer of his property but to insure the collection of taxes." 366 Pa. 90, 98, 76 A.2d 745, 748 (1950)., *Tracy v. County of Chester, Tax Claim Bureau*, 489 A.2d 1334, 1339 (Pa. 1985).

If Justice Flaherty had been presiding in this case, it would not be necessary for Swami to ask this court to grant Certiorari to uphold this fundamental principle.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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